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Convergence or Complementarity?

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Roger Alford has given us a thought-provoking and timely examination of the interplay between the trade and investment regimes, and particularly of the interplay in dispute settlement. His insightful observations go well beyond the usual bow to historical differences that, as a result of path-dependence, have led to the establishment of two regimes that diverge in multiple ways. Rather, he focuses on aspects of convergence and cross-fertilization between the two regimes and their mutually reinforcing nature. Both regimes have grown significantly since the WTO was established in 1995, and one might expect them to consolidate their respective positions of strength in the coming years. Yet one also can expect continued competition and divergence between the two sectors. Ideally, and perhaps idealistically, one might see the development of complementary regimes such that each works to provide redress for the matters that it is most suited to handle.

My comments below generally follow the organizational layout of Professor Alford's paper. First, I address some potential effects of the incorporation of investment agreements in preferential trading agreements (PTAs). Second, I consider the areas where the trade and investment regimes converge with respect to obligations. Third, I consider various implications of parallel proceedings that straddle the trade and investment regimes. Fourth, I consider cross-regime enforcement of rights and of remedies.

I. PTAs

Linking investment and trade obligations, as is done in PTAs, has some potential to minimize concerns that investment protections are asymmetrical obligations that require a great deal of states that are hosting investments from foreign investors but require nothing of the investors themselves or of the investors' home states. The classic example of a bilateral investment treaty (BIT) is an agreement between a capital-exporting state and a capital-importing state. BITs usually do not include a commitment to enhance the flow of capital between two countries; rather the *hope* is that a state will be more likely to attract foreign investors if it accords the investors certain protections.¹ States that are home to the investors gain by negotiating treaties that protect their investors.² This paradigm is shifting slightly as more BITs are negotiated between countries at similar levels of development and as traditional capital-importing states begin investing abroad.

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1. The literature is mixed about whether BITs actually increase investment. *See generally* KARL P. SAUVANT & LISA E. SACHS, THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT FLOWS (2009); Peter Egger & Valeria Merlo, *BITs Bite: An Anatomy of the Impact of Bilateral Investment Treaties on Multinational Firms*, 114 SCANDINAVIAN J. ECON. 1240 (2012).
 2. By negotiating investment treaties, home states give their investors more autonomy of action. The investors can submit claims of investment treaty violations directly against host states. Their ability to submit those claims also gives investors more leverage with respect to settlement.

Nonetheless, BITs tend to emphasize the protection of investors and their investments, and do not cover the broad array of matters that trade agreements address.

PTAs tend to reflect and to encourage the formation of deeper ties between governments and between governments and investors, so that each treaty partner has more to lose in the event of a rift. Professor Alford gives an excellent explanation of the potential for PTAs to facilitate the establishment of global supply chains that facilitate the establishment of manufacturing facilities across a number of countries.³ Given the breadth of coverage of most PTAs, there are more opportunities for reciprocal gains in the negotiation of the treaty and in its implementation; for example, states that permit the establishment of manufacturing facilities within their borders might in turn negotiate preferential tariff treatment for goods they export. Sovereigns thus have more incentive to solve their disputes diplomatically in order to preserve the deep and broad trading relationship.

Yet even with respect to PTAs, when disputes arise between Member States, disparities in bargaining power inevitably manifest themselves. For example, Mexico and the United States have had long-running disputes over access by Mexican companies to the U.S. market in the sugar and trucking services sectors. Mexico retaliated against the United States' refusal to open its market to Mexican sugar by imposing high taxes on the use of high-fructose corn syrup, which in turn led to multiple adversarial proceedings between the two countries in multiple fora. While Mexico tried to force the United States to comply with its North American Free Trade Agreement obligations, the United States disputed that it had agreed to open its market to Mexican sugar imports.⁴ The two countries finally came to an agreement in July 2006.⁵ Prior to the sugar dispute, Mexico had also won a Chapter XX dispute with the United States in the trucking case in 2001,⁶ though Mexican trucks have only recently been granted access to the U.S. market pursuant to a pilot program launched by the Department of Transportation's Federal Motor Carrier Safety Administration that permits Mexican-domiciled long-haul carriers to qualify to operate in the United States for up to three years.⁷ One might say that

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3. Roger Alford, *The Convergence of International Trade and Investment Arbitration*, 12 SANTA CLARA J. INT'L L. 35 (2013).
 4. See, e.g., Alford, *supra* note 3, at 35; see also Sergio Puig, *Investor-State Tribunals and Constitutional Courts: The Mexican Sweeteners Saga*, 5 MEXICAN L. REV. 199, 222-33 (2012) (providing a comprehensive analysis of the negotiations of Chapter 11 and the sweeteners conflict between Mexico and the United States).
 5. Magda Kornis, *U.S. Corn Sweeteners and Mexican Sugar: Agreement at Last!*, 1 J. INT'L COM. & ECON. 51, 59-60 (Dec. 2006).
 6. *In the Matter of Cross-Border Trucking Services (U.S.-Mex.)*, Secretariat File No. USA-MEX-98-2008-01, Final Report of the Panel, at ¶1, ¶¶ 291-92, ¶ 294-95, ¶ 297, ¶ 299 (NAFTA Arb. Panel Feb. 6, 2001).
 7. *U.S.-Mexico Cross-Border Trucking Pilot Program*, U.S. DEPARTMENT OF TRANSPORTATION, <http://www.fmcsa.dot.gov/intl-programs/trucking/Trucking-Program.aspx> (last visited Apr. 26, 2013).

precisely because the economies of Mexico and the United States are so linked, Mexico has been forced to bargain in the shadow of NAFTA and has had difficulty forcing the United States to abide by its obligations. Yet it is also true that in each of these cases diplomacy, bolstered by dispute settlement procedures, has resulted in a solution.

II. Convergence of Norms

Given the different goals and scope of coverage of PTAs and BITs, the different substantive obligations in the agreements overlap only in limited ways. Certainly, national treatment – non-discrimination on the basis of nationality – is the most evident common obligation.⁸ I share Professor Alford’s skepticism about the utility of comparing like products in the WTO/GATT context with “like circumstances” as usually used in the investment context; unlike him, I am more optimistic that tribunals have generally rejected the analogy.

Initially investor-state tribunals, particularly those convened under NAFTA, encouraged by analogies and arguments made by counsel, relied on GATT/WTO jurisprudence in their rulings.⁹ Yet after the first few years, investment tribunals have been much less inclined to look to WTO jurisprudence, and have even expressed skepticism about its relevance. This quote from the *Methanex* case (written in 2005), in which the tribunal rejected the argument that GATT’s treatment of “like goods” was relevant to the determination of whether two entities were in “like circumstances,” as required by NAFTA Article 1102, is illustrative:

The issue here is not the relevance of general international law, as the late Sir Robert Jennings proposed on behalf of Methanex, or the theoretical possibility of construing a provision of NAFTA by reference to another treaty of the parties, for example the GATT. International law directs this Tribunal, first and foremost, to the text; here, the text and the drafters’ intention, which it manifests, show that trade provisions were not to be transported to investment provisions. Accordingly, the Tribunal holds that Article 1102 is to be read on its own terms and not as if the words “any like, directly competitive or substitutable goods” appeared in it.¹⁰

NAFTA requires equality of treatment of investors, and investments of investors, that are in like circumstances.¹¹ Not all investment treaties have the same formulation, and

8. Alford, *supra* note 3, at 41.

9. MEG KINNEAR, ANDREA K. BJORKLUND, & JOHN F.G. HANNAFORD, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA, CHAPTER 11 §1102.12-1102.17.1 (2006 & Supp. 2009).

10. *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits (Aug. 3, 2005).

11. NAFTA Article 1102 provides:

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
2. Each Party shall accord to investments of investors of another Party treatment

some contain no reference to the word “like” at all, though most commentators agree that some comparative exercise must be undertaken, regardless of the words of the treaty.¹² Particularly when there is a direction to look at the circumstances surrounding the investments, rather than at the investments themselves, a departure from the GATT’s focus on like products is warranted and it is reasonable to treat “like products” in the GATT context as *lex specialis* and of little relevance to most cases brought under investment treaties.¹³ Yet the effect of that rejection is not always certain. The question of whether investors, or their investments, are like each other can lead to both broader and narrower assessments of what is “like” than a straightforward like, or even a directly competitive or substitutable, product analysis would.¹⁴

Professor Alford also refers to an investment tribunal’s reliance on GATT Article XX’s treatment of the word “necessary” when that tribunal was construing the meaning of “necessary” in the context of the essential security provision in the Argentina–United States BIT.¹⁵ I have expressed my skepticism about this particular cross-fertilization due to the excision of the word “necessary” in the body of GATT Article XX from the protective mechanism of the chapeau.¹⁶ In WTO jurisprudence the two sections work together, with panels and the appellate body showing a fair amount of deference to member states in their determination of what measures are “necessary” to protect human, animal, or plant life or health, with scrutiny under the chapeau ensuring a last “check” on whether or not the measure taken was done for bona fide reasons. The investment tribunal borrowed from the “necessary” jurisprudence developed by the WTO appellate body without also importing its context – the protective chapeau. This arguably resulted in a deferential view of what the respondent state viewed as “necessary” without considering whether the measure constituted arbitrary or discriminatory treatment or a disguised restriction on trade (or, given the different context, investment).

no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

12. North American Free Trade Agreement, Dec. 19, 1992, 32 I.L.M. 289 [hereinafter NAFTA].
13. See Andrea K. Bjorklund, *National Treatment*, in STANDARDS OF INVESTMENT PROTECTION 29, 29-48 (August Reinisch ed., 2008).
14. One could imagine a case where the investment is in the manufacture of goods competing with those produced by a local company where the issue of like, or directly competitive or substitutable, products would be relevant.
15. KINNEAR ET AL., *supra* note 9, §1102.40b – 1102.40c.
16. Alford, *supra* note 3, at 55 & n.114. See *Continental Casualty Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, ¶¶ 182-88 (Sept. 5, 2008).
17. Andrea K. Bjorklund & Sophie Nappert, *Beyond Fragmentation*, in NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: IN MEMORIAM THOMAS WÄLDE 466, 466-479 (Todd Weiler & Freya Baetens eds., 2011).

III. Parallel Proceedings

The question of parallel proceedings raises a fascinating cluster of issues illustrative of the convergence in trade and investment and the complementarity between the different regimes.¹⁷ One thing is clear: investors will leave no stone unturned in seeking relief when they view themselves as injured by state conduct.

Investors have every incentive to seek relief in multiple fora due to the differing nature of the remedies available. Investment law tends to give retrospective relief in the form of money damages enforceable under the New York or ICSID Conventions.¹⁸ In the WTO the primary remedy is prospective relief in the form of removal of the offending measure with retaliation for non-compliance possible in the form of suspension of concessions or compensation by way of compensating tariff reductions (ordinarily a complainant is not entitled to monetary compensation).¹⁹ These differences mean that relief received will often be complementary,²⁰ yet one can imagine cases in which there is overlap. To take one example, relief for an expropriation requires the assessment of the fair market value of the property taken. In the case of a “going concern,” this calculation would encompass future profits so long as they could be proved with reasonable certainty. If the measure were rescinded, should not the monies payable to compensate for lost future earnings be eliminated from the damages award? In short,

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17. One issue of increasing interest is the nature of the rights enjoyed by investors and how those overlap with states. Several years ago I wrote a paper outlining some of the problems that one could anticipate given the unclear nature of the rights enjoyed by investors and the unclear relationship between investors and their home states. Andrea K. Bjorklund, *Private Rights and Public International Law: Why Competition Between International Courts and Tribunals Is Not Working*, 59 HASTINGS L.J. 241 (2007). Those issues are even more cogent now as it seems states are asserting themselves into the investment dispute realm. Recently Ecuador sought to initiate dispute settlement against the United States under the state-state article of the Ecuador-United States BIT. The tribunal found that it lacked jurisdiction. Luke Eric Peterson, *US-Ecuador Inter-State Investment Treaty Award Released to Parties; Tribunal Members Part Ways on Key Issues*, 5 INVESTMENT ARB. REP., no. 21 (Nov. 12, 2012), available at http://www.iareporter.com/articles/20121030_1 (article available through subscription or purchase). A more sustained exploration of those issues is warranted, but is beyond the scope of this short comment.
 18. Successful enforcement is sometimes more difficult than is apparent on the surface, given the execution immunity enjoyed by many state-owned assets. See Andrea K. Bjorklund, *State Immunity and the Enforcement of Investor-State Arbitral Awards*, in INTERNATIONAL INVESTMENT LAW FOR THE TWENTY-FIRST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 302 (Christina Binder, Ursula Kriebaum, August Reinisch & Stephan Wittich eds., 2009).
 19. Dispute Settlement Understanding art. 22.4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1867 U.N.T.S. 154. See also John Jackson, Editorial Comment, *International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to “Buy Out”?*, 98 AM. J. INT’L L. 109 (2004); Alan O. Sykes, *Public versus Private Enforcement of International Economic Law: Standing and Remedy*, 34 J. LEGAL STUD. 637 (2005).
 20. See Alford, *supra* note 3, at 47 (describing relief received by the United States and by US investors from Mexico for Mexico’s imposition of the taxes on HFCS).

notwithstanding divergence there is the possibility of overlap and the need for tribunals to take each other's decisions into account.

Should parallel proceedings exist at all? It is easy when comparing the WTO Agreements and investment treaties to see differences in remedies and in claimants and to minimize concerns of overlap. But multiple proceedings place a great deal of pressure against one defendant. In private law cases concerns about parallel proceedings arise because of their vexatious or harassing nature. There are also concerns about inconsistent decisions, a problem that has bedeviled investment arbitration as well.²¹ Yet refusing to allow parallel proceedings merely because different tribunals might come to different decisions, thus triggering difficulties in reconciling them, seems to avoid one problem – designing a regime to accommodate competing decisions – by creating others, including the potential for one tribunal to exercise jurisdiction when another might be better situated to hear the case, or to decide a case incorrectly without the salutary effect of another tribunal's decision requiring a reassessment of the first award. That trade-off might be worthwhile if one's goal is to create a unified regime in which all tribunals abide by the same rules, in which there is a good deal of similarity in the law applied by various tribunals, and in which there is a central control mechanism in place to ensure that each tribunal abides by its obligations. The European Union countries have created such a regime, initially via the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters and now through EU Regulation 44/2001,²² supervised by the Court of Justice of the European Communities. Under the Brussels Regulation, the court first seised of a matter has priority and other tribunals must give way.²³ The Regulation also has elaborate rules governing the exercise of jurisdiction by the courts subject to its authority.²⁴

If or when some regime similar to the Brussels Convention could be created across the differing regimes found in international law (or even in international economic law), barring parallel proceedings might be sensible. As it stands, however, it is much more likely that we will continue to face a fragmented regime in which different actors (e.g. investors and states) can invoke different laws (e.g. BIT obligations or WTO obligations or Law of the Sea obligations) before different tribunals (e.g. ad hoc arbitral bodies or the WTO Dispute Settlement Body). States have created these multiple regimes with some

21. See, e.g., Gabrielle Kaufmann-Kohler, *Is Consistency a Myth?*, in PRECEDENT IN INTERNATIONAL ARBITRATION 137 (Emmanuel Gaillard & Yas Banifatemi eds., 2008); see Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 53 FORDHAM L. REV. 1521 (2005).

22. Council Regulation 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L12), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:012:0001:0023:EN:PDF>.

23. *Id.* art. 27.

24. *Id.* arts. 2-30.

overlap and some complementarity, and an attempt to minimize the former while enhancing the latter is the most beneficial course currently available.

IV. Cross-Regime Enforcement of Rights and Remedies

The idea of using investment obligations to enforce trade obligations is not new – the claimants in some of the early NAFTA cases²⁵ made some very creative arguments on the basis of NAFTA Article 1105, which promises treatment in accordance with international law.²⁶ One of the arguments was that treatment in accordance with international law meant treatment in accordance with any international legal obligation binding as between Canada and the United States, *i.e.*, potentially extending to WTO obligations, the International Covenant on Civil and Political Rights, and the like.²⁷ The arguments in those early cases were among the factors that led to the Note of Interpretation limiting Article 1105 to the minimum standard of treatment and stating that “A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).”²⁸ This response demonstrates the unease of the NAFTA Parties at the possibility of cross-enforcement of norms.

These arguments might be viewed as an early precursor to Professor Alford’s idea of using an “umbrella clause” to bring other obligations within the purview of an investment treaty tribunal.²⁹ Umbrella clauses, also called “observance of undertakings” clauses, are treaty obligations in which a state promises to observe the undertakings it has given investors.³⁰ These clauses are often invoked when a state has violated a contract with an investor; the umbrella clause can potentially “elevate” the contractual

25. *See, e.g.*, Pope & Talbot, Inc. v. Government of Canada, NAFTA Trib. Memorial of the Investor (Second Phase), ¶¶108-193 (Sept. 5, 2000), *available at* <http://www.naftalaw.org/Disputes/Canada/Pope/PopeInvestorSecondPhaseMemorial.pdf>; S.D. Myers v. Government of Canada, NAFTA Trib. Partial Award, ¶261 (Nov. 13, 2000), *available at* <http://www.italaw.com/sites/default/files/case-documents/ita0747.pdf>; S.D. Myers v. Government of Canada, NAFTA Trib. Reply of the Investor Initial Phase, ¶ 100-115 (July 20, 1999), *available at* <http://www.naftalaw.org/Disputes/Canada/SDMyers/SDMyersReply.pdf>.

26. KINNEAR ET AL., *supra* note 9, §1105.21-1105.27.

27. Pope & Talbot, Inc., *supra* note 25, at ¶¶ 125, 190-93; *see also* KINNEAR ET AL., *supra* note 9, §1105.23-1105.24.

28. NAFTA Free Trade Commission July 31, 2001 Notes of Interpretation on Access to Documents and Minimum Standard of Treatment in Accordance with International Law, FOREIGN AFFAIRS, TRADE AND DEVELOPMENT CANADA, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/nafta-interpr.aspx?lang=eng> (last visited Nov. 4, 2013).

29. Alford, *supra* note 3, at 55-60.

30. *See, e.g.*, KATIA YANNACA-SMALL, *What About This “Umbrella Clause”?*, in *ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES* 479, 483-85 (Katia Yannaca-Small ed., 2010).

breach to the level of a treaty breach.³¹ This idea is fascinating, but will almost certainly meet a great deal of resistance from states, as they are unlikely to view undertakings made in other treaties as falling within the scope of an umbrella clause. Yet one can see that the argument is likely to be attractive to an investor with a private right of action under an investment treaty. For example, the investor might want to challenge a measure that violates the WTO TRIMs (trade related investment measures) agreement.³² Most investment treaties do not bar performance requirements – the U.S. treaties are an exception – so the investor would need to use the umbrella clause to bring an investment claim for a violation of the TRIMs agreement on the theory that abiding by TRIMs is an undertaking made to an investor's investment. I query the success of such a ploy – the TRIMs undertakings are made to the other WTO parties, not to investors themselves – but one can see the attraction of attempting to make the argument.

Of course, in order for investors to decide it is worthwhile to seek “trade” remedies in the investment context, they must have the ability to obtain the remedies they receive. In fact, if investors are going to continue to seek relief under their investment treaties at all, they must be able to enforce the awards rendered in their favor. The recent difficulty enforcing awards against Argentina, Kazakhstan, Kyrgyzstan, Russia, and Zimbabwe suggests that investors ought to have a lot more doubt about the desirability of submitting claims when resulting damages might be almost impossible to collect.³³

Inability to secure remedies within one regime makes the idea of cross-regime retaliation appealing, as Professor Alford notes.³⁴ The United States' revocation of generalized system of preferences (GSP) status for Argentina and reported interventions at the International Monetary Fund and the Paris Club suggest alternate avenues for relief exist,³⁵ though I am concerned about the re-introduction of diplomatic protection and power politics evidenced by those strategies.³⁶ Notwithstanding those reservations, I entirely agree with Professor Alford that they demonstrate the increasing relevance and power of international law. Both Argentina and the United States have made, in the investment treaty between them and in the ICSID Convention, commitments enforceable at international law. The punishment for not abiding by those commitments or meeting

31. On umbrella clauses generally, see MONIQUE SASSON, SUBSTANTIVE LAW IN INVESTMENT TREATY ARBITRATION: THE UNSETTLED RELATIONSHIP BETWEEN INTERNATIONAL AND MUNICIPAL LAW 173-94 (2010).

32. Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186 [hereinafter TRIMs Agreement].

33. Bjorklund, *State Immunity*, *supra* note 18, at 321.

34. See generally Alford, *supra* note 3.

35. Alford, *supra* note 3, at 53.

36. See Andrea K. Bjorklund, *Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-politicization of International Investment Disputes*, 21 AM. REV. INT'L ARB. 211 (2010).

conditions for favorable treatment is part and parcel of a complex regime of interlocking obligations. By using sanctions available outside the investment arena, the United States has shown its willingness to protect U.S. persons and to hold Argentina to its obligations.

These tactics raise a question about whether and when it is appropriate for the United States to intervene in an investment dispute brought by a U.S. investor. The ICSID Convention specifies that a state must suspend diplomatic protection during the pendency of ICSID Convention proceedings, but it also clearly dictates that if a state fails to pay an award, the home state of the investor can assert diplomatic protection or bring an international claim for non-payment of the award.³⁷ In the Argentine context, given Argentina's non-payment of awards, the United States is not violating any obligation under the ICSID Convention. Should a state act prior to the resolution of the investor-state dispute, the potential impropriety of the act would arise.³⁸

Here, though, and I regret closing on a pessimistic note – I wish I could be as sanguine about the power of international law as Professor Alford. On one view, the United States' retaliation against Argentina reflects more of a return to power politics rather than judicially sanctioned dispute settlement. The United States can influence Argentina because of its relatively strong economic power. No dispute settlement body authorized the United States to suspend GSP as to Argentina. Even if it had – even this were a retaliation under Article 21.5 of the Dispute Settlement Understanding³⁹ – experience suggests that powerful states have greater leverage against less powerful states than the other way round, notwithstanding creative cross-sectoral retaliation in the WTO context. There is some danger that convergence in the trade and investment regimes simply exacerbates the already existing imbalance between powerful and less powerful actors in the international regime.

37. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 27(1), Mar. 18, 1965, 575 U.N.T.S. 159, 176.

38. For non-ICSID Convention disputes query whether there is an implied obligation to suspend home-state-initiated related proceedings during the pendency of the dispute.

39. Understanding on Rules and Procedures Governing the Settlement of Disputes art 21.5, Apr. 15, 1994 Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.